Nos. 09-987, 09-991

In the Supreme Court of the United States

ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION,
Petitioner,
v.
KATHLEEN M. WINN, ET AL., *Respondents.*

GALE GARRIOTT, DIRECTOR,
ARIZONA DEPARTMENT OF REVENUE, *Petitioner,*
v.
KATHLEEN M. WINN, ET AL., *Respondents.*

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICI CURIAE* OF UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA, CHRISTIAN LEGAL SOCIETY, COUNCIL FOR CHRISTIAN COLLEGES & UNIVERSITIES, CENTER FOR ARIZONA POLICY, AND ASSOCIATION FOR BIBLICAL HIGHER EDUCATION IN SUPPORT OF PETITIONERS

DOUGLAS LAYCOCK
580 Massie Road
Charlottesville, VA 22903
(434) 243-8546

NATHAN J. DIAMENT
INSTITUTE FOR PUBLIC AFFAIRS
UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA
800 8th Street, NW
Washington, D.C. 20001
(202) 513-6484

Counsel for Amici Curiae [Additional Counsel Listed On Inside Cover]

THOMAS C. BERG
Counsel of Record
University of St. Thomas School of Law
MSL 400, 1000 LaSalle Ave.
Minneapolis, MN 55403
tcberg@stthomas.edu
(651) 962-4918

ANTHONY R. PICARELLO, JR.
JEFFREY HUNTER MOON
UNITED STATES CONFERENCE OF CATHOLIC BISHOPS
3211 Fourth St., N.E.
Washington, D.C. 20017
(202) 541-3300

KIMBERLEE WOOD COLBY
CHRISTIAN LEGAL SOCIETY
8001 Braddock Rd., Ste. 300
Springfield, VA 22151
(703) 894-1087

SHAPRI D. LOMAGLIO
COUNCIL FOR CHRISTIAN
COLLEGES & UNIVERSITIES
321 Eighth St. NE
Washington, DC 20002
(202) 546-8713

CATHI HERROD
DEBORAH SHEASBY
CENTER FOR ARIZONA POLICY
7227 North 16th St.,
Ste. 250
Phoenix, AZ 85020
(602) 424-2525

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER SOURCES

INTEREST OF *AMICI CURIAE*[1]

The **United States Conference of Catholic Bishops** ("USCCB") is a nonprofit corporation, the members of which are the active Catholic Bishops in the United States. USCCB advocates and promotes the pastoral teachings of the U.S. Catholic Bishops in such diverse areas of the nation's life as the free expression of ideas, fair employment and equal opportunity for the underprivileged, protection of the rights of parents and children, the sanctity of life, and the importance of education. Values of particular importance to the Conference are the protection of the First Amendment rights of religious organizations and their adherents, and the proper development of this Court's jurisprudence in that regard.

The **Union of Orthodox Jewish Congregations of America** ("UOJCA") is a non-profit organization representing nearly 1,000 Jewish congregations throughout the United States. Founded in 1898, it is the largest Orthodox Jewish umbrella organization in the nation. Through its Institute for Public Affairs, the UOJCA advocates legal and public policy positions on behalf of the Orthodox Jewish community.

---

[1] Pursuant to this Court's Rule 37, *amici curiae* have obtained the parties' consent to the filing of this brief, and the consent letters are on file with the Clerk of the Court. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amici curiae*, their members, or their counsel made a monetary contribution to the preparation and submission of this brief.

The American Orthodox Jewish community has flourished because of the religious liberties guaranteed by the First Amendment and, by virtue of those liberties and others, our community's ability to found and foster Jewish schools in which we educate our children to be proud Americans and committed and knowledgeable Jews. Thus, this case is critical to the welfare of the American Jewish community.

The **Center for Arizona Policy** is a nonprofit, public policy and legal organization dedicated to promoting and defending the institution of the family as the primary element of civil society. The Center supports public policy that recognizes the fundamental right of parents to direct the education and upbringing of their children. The Center also supports public policy that expands the educational options available to parents. To this end, the Center has worked to support and enhance the program that is the subject of this litigation when it has been considered by the Arizona Legislature.

The **Council for Christian Colleges & Universities** ("CCCU") is an international association of intentionally Christian colleges and universities. Founded in 1976 with 38 members, the CCCU has grown to 110 members in North America and 75 affiliate institutions in 24 countries. The CCCU represents over 300,000 students and over 1.5 million alumni. CCCU's mission is: "[t]o advance the cause of Christ-centered higher education and to help our institutions transform lives by faithfully relating scholarship and service to biblical truth." Among its many programs, CCCU provides semester

long educational courses for students of its member institutions, including eight year round study abroad programs in seven different countries along with four specialized studies programs in the United States.

The **Association for Biblical Higher Education**, a national accrediting association officially recognized by the United States Department of Education, is comprised of approximately 125 postsecondary institutions throughout North America, with an aggregate enrollment of over 35,000 students. Founded in 1947, the Association specializes in biblical ministry formation and professional leadership education, with its purposes to promote excellence and cooperation among its member institutions and to promote the distinctive of biblical higher education to the educational community, the church and society.

Christian Legal Society ("CLS") is a nonprofit, interdenominational association of Christian attorneys, law students, judges, and law professors with chapters in nearly every state and at numerous accredited law schools. The Society's legal advocacy and information division, the Center for Law & Religious Freedom, works for the protection of religious belief and practice, as well as for the autonomy from the government of religion and religious organizations, in state and federal courts throughout this nation. The Center strives to preserve religious freedom in order that men and women might be free to do God's will and because the founding instrument of this nation acknowledges

as a "self-evident truth" that all persons are divinely endowed with rights that no government may abridge nor any citizen waive. Among such inalienable rights is the right of religious liberty.

While representing diverse views on issues of doctrine and policy, and indeed at times disagreeing on such issues, *amici curiae* come together because the Arizona program at issue in this case is not only entirely constitutionally permissible, but also a sound attempt to provide Arizona families with a variety of educational options from which to choose a school that best suits the needs of the individual child.

SUMMARY OF ARGUMENT

This case involves a state program, religion-neutral in its terms, under which private individuals receive a tax credit for contributing to private student tuition organizations (STOs) that in turn use the money to provide scholarships at private schools of the STOs' choice; families choosing those schools may then apply for the scholarships. At each step, the decision to direct resources toward a particular private school is made by private individuals or private STOs. The program, therefore, is one of "true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals." *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002). With respect to such a private-choice program, this Court has repeatedly held that the fact that benefits ultimately reach religious schools creates no Establishment Clause issue. *Id.*;

Zobrest v. Catalina Foothills School Dist., 509 U.S. 1 (1993); *Witters v. Dept. of Servs.*, 474 U.S. 481 (1986); *Mueller v. Allen*, 463 U.S. 388 (1983). Nor, as these decisions make clear, does it matter what percentage of the benefits are used at religious schools, since the choices that produce that result are private rather than state action.

The court of appeals in this case nevertheless held that the Arizona program violates the Establishment Clause if (as is undisputed) 85 percent of the scholarships available under the program were for places at religious schools. This ruling, as we will show, disregards every major principle of the "true private choice" approach articulated from *Mueller* through *Zelman*.

Before *amici* turn to the court of appeals' missteps here, we want to place the "private choice" approach in broader context. That approach is not simply a principle for cases about "indirect aid" to religious schools or other religious institutions. Government respect for the voluntary choices of private parties in matters of religion embodies the most fundamental goal of the Religion Clauses as a whole. It minimizes government influence over religious decisions, and it specifies the way in which government action should be neutral toward religion: it should be "substantively neutral," in the sense of minimizing government-created incentives either for or against religious practice. This overall approach also draws together much of this Court's jurisprudence in major categories of Religion Clause cases. It explains, for example, why the Court has permitted programs of even-handed aid benefiting

private religious institutions but has simultaneously kept strong Establishment Clause limits on government's own religious speech. It also explains when government should treat religion equally with other activities, and when government may and should give distinctive accommodation to private religious exercise. We urge the Court to treat protection of private religious choice as a touchstone for the Religion Clauses generally.

The court of appeals' decision is utterly at odds with the governing private-choice approach of *Zelman*, *Mueller*, and other decisions. The court below reasoned that, "from the perspective of parents" (Pet. App. 31a),[2] the program was not religiously neutral and did not offer genuine choice, because most of the available scholarships were at religious schools. This violates the private-choice approach in two ways. First, the court below refused to give effect to the fact that taxpayers' decisions to contribute to STOs, and STOs' decisions to fund religious schools, are likewise fully private choices. The supply of private-school options was equally constrained in *Zelman* by private choices, and this Court has repeatedly made clear that a standard for constitutionality that turns on shifting percentages of private choices is impossible to administer. It is also inconsistent with constitutional tradition, which respects voluntary initiatives to form and support religious institutions as well as voluntary choices to attend them.

---

[2] Hereinafter all references to "Pet. App." are to the appendix to the petition in *ACSTO v. Winn*, No. 09-987.

Second, in focusing solely on the percentage of private schools in the program that were religious, the Court utterly failed to follow *Zelman* and consider the public schools that the state already funds outside the program. *See Zelman*, 536 U.S. at 655-56 (the question of coercion and choice "must be answered by evaluating *all* options Ohio provides Cleveland schoolchildren, only one of which is to obtain a program scholarship and then choose a religious school") (emphasis in original). When the public schools are included in the calculation, of course, parents in Arizona have multiple secular options. The ordinary public schools should count as genuine options, but Arizona (like Ohio in *Zelman*) also provides a variety of public-school choices, including charter and magnet schools. Recognizing the public schools as a secular option reflects a vital point. In the absence of state assistance for private schools, the state funds only one, secular category: public schools. Private-school aid increases the range of choices, and thus it is perverse to invalidate such an aid program—as the panel did here—on the ground that the extra choices it offers have (because of private choice) some limits.

ARGUMENT

I. The Test Of *Zelman v. Simmons-Harris* And Other Cases, Permitting Government Aid Programs That Facilitate Private Choice Concerning Religion, Governs This Case And Also Embodies The Most Fundamental Goal Of The Religion Clauses As A Whole.

A. The Test of "True Private Choice," from Numerous Decisions Culminating in *Zelman*, Governs This Case.

The court of appeals correctly recognized that "Section 1089 is an indirect aid program, under which the state gives tax credits to individuals who contribute to STOs, which in turn use the money to provide private school scholarships" (Pet. App. 20a), and that this case therefore is governed by the principles of *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), and decisions leading up to it. *Mueller v. Allen*, 463 U.S. 388 (1983); *Witters v. Dept. of Servs.*, 474 U.S. 481 (1986); *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993). These decisions all hold that the Establishment Clause permits the inclusion of religious schools in aid "programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals." *Zelman*, 536 U.S. at 649 (citing *Mueller*, *Witters*, and *Zobrest*).

Zelman, which upheld Ohio's voucher program for students in Cleveland's public school system, sets out the features that make a program one of true

private choice. First, such a program gives aid "to a broad class of individuals, who, in turn, direct the aid to religious schools or institutions of their own choosing." *Id.* at 649. Second, the program's terms are "neutral with respect to religion," *id.* at 652, so that it creates "no 'financial incentive[s]' that 'ske[w]' the program toward religious schools." *Id.* at 653 (brackets in original) (quoting *Witters*, 474 U.S. at 487-88); *see id.* at 650 (tax deduction in *Mueller* was upheld because there was "no evidence that the State deliberately skewed incentives toward religious schools"). Finally, in a case of true private choice there are "genuine opportunities for [ ] parents to select secular educational options." *Zelman,* 536 U.S. at 655.

In such cases, when an individual chooses to channel aid to a religious school, "[t]he incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits." *Id.* at 652. That is, "any aid ultimately flowing to" a religious institution does not "result[] from a *state* action sponsoring or subsidizing religion," but from a private action. *Witters*, 474 U.S. at 488 (emphasis in original). "[T]he circuit between government and religion [i]s broken, and the Establishment Clause [i]s not implicated." *Zelman*, 536 U.S. at 652. Thus, there is a "close relationship between [the neutrality] rule, incentives, and private choice. For to say that a program does not create an incentive to choose religious schools is to say that the private choice is truly 'independent.'" *Mitchell v. Helms*, 530 U.S.

793, 814 (2000) (Thomas, J., for four justices) (quoting *Witters*, 474 U.S. at 487).

In Part II *infra*, we discuss why Arizona's program of tax credits for contributions to organizations funding scholarships at private religious schools is unquestionably a program of true private choice. The court of appeals panel held that it was not, but its effort to distinguish *Zelman* and other private-choice decisions is utterly meritless. *See infra* pp. 21-35. Before turning to the specifics of this case, however, we wish to put this case in larger context. The principle of private choice is fundamental to the Religion Clauses as a whole.

B. Government Respect for Private Choice in Religious Matters—or Substantive Neutrality toward Religion—Is the Most Fundamental Goal of the Religion Clauses.

Respecting the voluntary choices of private parties in matters of religion is not simply a principle for cases about "indirect aid" to religious schools or other religious institutions. The principle embodies the most fundamental goal of the Religion Clauses as a whole, and it draws together much of this Court's jurisprudence in major categories of cases under the clauses.

The ultimate goal of the Constitution's provisions on religion is religious liberty for all—for believer and nonbeliever, for Christian and Jew, for Protestant and Catholic, for Western traditions and Eastern, for large faiths and small, for atheist and

agnostic, for secular humanist and the religiously indifferent, for every individual human being in the vast mosaic that makes up the American people. The ultimate goal is that every American should be free to hold his or her own views on religious questions, and to live the life that those views direct, with a minimum of government interference or influence. The fundamental principle to achieve that goal is for the government to maintain "substantive neutrality" toward religion:

> [S]ubstantive neutrality [means] this: the Religion Clauses require government to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance.... [R]eligion [should] be left as wholly to private choice as anything can be. It should proceed as unaffected by government as possible. . . .
>
> This elaboration highlights the connections among religious neutrality, religious autonomy, and religious voluntarism. Government must be neutral so that religious belief and practice can be free. The autonomy of religious belief and disbelief is maximized when government encouragement and discouragement is minimized. The same is true of religious practice and refusal to practice. The goal of maximum religious liberty can help identify the

> baseline from which to measure encouragement and discouragement.

Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993, 1001-1002 (1990).

Put differently, the goal of the Religion Clauses is that religion in America should flourish or decline, not according to whether government promotes or hinders it, but "according to the zeal of its adherents and the appeal of its dogma." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).[3] This formulation restates the principle of private choice, as Justice Brennan once summarized:

> Fundamental to the conception of religious liberty protected by the Religion Clauses is the idea that religious beliefs are a matter of voluntary choice by individuals and their associations, and that each sect is entitled to "flourish according to the zeal of its adherents and the appeal of its dogma."

McDaniel v. Paty, 435 U.S. 618, 640 (1978) (Brennan, J., concurring) (quoting *Zorach*; footnote omitted).

---

[3] The Court has later quoted this formulation in decisions from *Walz v. Tax Commission*, 397 U.S. 664, 669 (1970), to *Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 382 (1985), *overruled on other grounds by Agostini v. Felton,* 521 U.S. 203, 235 (1997).

The principle that religion should succeed according to individuals' zeal, without government interference or promotion, finds expression throughout our history. For example, James Madison complained that defenders of establishments, who sought state favoritism for Christianity, showed an unwillingness "to trust [the faith] to its own merits." Memorial and Remonstrance Against Religious Assessments, ¶ 6 (1785), quoted in *Everson v. Board of Education*, 330 U.S. 1, 63, 67 (1947) (appendix to opinion of Rutledge, J., dissenting). Conversely, the elimination of state favoritism for established churches in the early Republic, as many historians emphasize, helped unleash a wave of religious energy, largely in the form of "voluntary societies" that founded and expanded churches, colleges**,** and other educational institutions, and humanitarian and social-reform programs. *See, e.g.*, Winthrop S. Hudson, *Religion in America* 143 (4th ed. 1987); Mark A. Noll, *America's God: From Jonathan Edwards to Abraham Lincoln* 197-98 (2002); Robert Baird, *Religion in America* 286-92 (1844) (Arno Press reprint 1969). The elimination of financial favoritism by the state—the adoption of the "voluntary principle," as a leading antebellum commentator, Robert Baird, first labeled it—produced an atmosphere in which Americans were "trained to exercise the same energy, self-reliance, and enterprise in the cause of religion which they exhibit in other affairs." *Id.* at 290, 292. Americans created new churches, schools, and social services through precisely the kind of charitable initiative that Arizona has facilitated with tax credits.

1. Government aid benefiting religious institutions.

The principles of voluntarism and substantive neutrality are directly reflected in this Court's approval of private-choice programs of educational aid. To reiterate, in such programs the government creates no incentives to choose a religious or nonreligious school: individuals decide to apply their benefits based on whether they have "zeal" for, or find "appeal" in, a particular school's education or ideology. *See Zorach*, 343 U.S. at 313. "Financial aid can be distributed in a way consistent with individual choice": "[e]ach family receiving a government voucher can choose the school that it prefers among all the options available," and "even where the choices are inadequate, there are more choices with the voucher than without it." Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes But Missing the Liberty*, 118 Harv. L. Rev. 155, 157 (2004).

The last point in the previous paragraph deserves particular attention. It is often asserted—the court of appeals did so here—that government programs aiding private schools are impermissible because they ultimately give disproportionate benefits to religious schools or "steer" parents toward those schools. But in the absence of a private-school aid program, government funds only one, secular category: public schools, whose teaching must by definition be secular because of Establishment Clause restraints. Thus public-school-only funding

"itself is a powerful 'disparate impact' favoring secular uses and disfavoring religious ones." Eugene Volokh, *Equal Treatment is Not Establishment*, 13 Notre Dame J. L. Ethics & Pub. Pol'y 341, 348 (1999); Thomas C. Berg, *Vouchers and Religious Schools: The New Constitutional Questions*, 72 U. Cin. L. Rev. 151, 158-59 (2003) (public-school-only funding "'steers' students away from religious and toward secular schools"); Douglas Laycock, *Substantive Neutrality Revisited*, 110 W. Va. L. Rev. 51, 84 (2007) (the alternative to programs of true private choice "is for government to offer up to $10,000 for education to those families, and only those families, who surrender their constitutional right to get that education in a religious environment. The coercive effect of that conditional offer dwarfs the benefit to religion of making the money available on equal terms.").

Private-school aid programs therefore increase choice, even if only to a limited extent, over the previous secular-only option of public schools. This fact does not mean, of course, that such programs are constitutionally required. But it does confirm why *Zelman* and other decisions have recognized them as permissible, and why grudging, restrictive approaches like the panel's here frustrate religious liberty rather than promote it. Specifically, as we discuss *infra* (pp. 30-35), the public schools should typically count as a "genuine secular option" under the *Zelman* test.

The adoption of voluntarism in the founding period and the early Republic typically meant the end of state financing that had been given to

religious institutions alone or to one particular denomination. But the promotion of voluntary choice in religious matters does not necessarily mean, and has not meant in our tradition, that government aid can never benefit religious institutions that provide services such as education or humanitarian work that the state wishes to support. The modern activist state frequently pursues these goals by supporting private institutions. When it does so, voluntarism and private choice are best served not by excluding religious institutions, but by including them, on equal terms, in aid that is channeled to them on the basis of individuals' choices.

These benefits of true private choice also help define the limits of true-private-choice programs. Money can flow from government through private individual choices to religious institutions only when those institutions are providing some secular service—education, health care, social services, etc.—that is also provided by secular institutions. Religious providers may offer the service in a religious environment, or with additional religious services attached, but they are eligible for the program only if they are providing some secular service that the state desires to subsidize. Religious schools in Arizona teach all the subjects in the compulsory education curriculum as well as whatever they teach about religion. The logic of true private choice could not justify a subsidy to the religious functions of the church itself—even if every religious organization in America were treated equally—because there is no equivalent secular

program that could be packaged with the religious functions in a program of private choice.

The Court's approach in private-choice cases also eliminates another means by which a government aid program might interfere with religious choice and autonomy. Such a concern arises if the conditions on aid require the institution involved to secularize its operations. *See, e.g.*, *Lemon v. Kurtzman*, 403 U.S. 602, 619-20 (1971) (holding that aid conditions mandating that subsidized teachers present courses from a secular perspective required "excessive entanglement" for the state to police). In *Lemon*, a case not involving a private-choice program, the Court held that although conditions on subsidized teachers and the content of subsidized courses were objectionable, to proceed without such restrictions was also unconstitutional. *Id.* at 619. But with a private-choice program, there is no such "Catch 22" (*Bowen v. Kendrick*, 487 U.S. 589, 615 (1988)). The school or social service ultimately benefiting can be thoroughly religious, in a particular activity or in its overall character, because the aid reaches it as a result of private rather than governmental decisions. *See, e.g.*, *Zelman* (upholding aid used at religious elementary and secondary schools); *Witters* (upholding aid used at bible school training students for the ministry). Arizona's statute is consistent with this model: it places almost no restrictions on the autonomy of the schools to which taxpayers may make contributions and receive a tax credit, and therefore involves little

if any surveillance or control over religious institutions. [4]

2. Other Religion Clause cases.

While the Court has relaxed restrictions on government funding of private religious institutions, it has maintained relatively strict restrictions on the government's ability to engage in religious speech itself. Recent decisions reaffirm the ban on government-sponsored religious exercises in public schools, *Lee v. Weisman*, 505 U.S. 577 (1992); *Doe v. Santa Fe Ind. School Dist.*, 530 U.S. 290 (2000), and prohibit government from sponsoring a display endorsing a particular set of religious views, *McCreary County v. American Civil Liberties Union,* 545 U.S. 844 (2005). Principles of neutrality and private choice explain these rulings as well. Any express religious statement the government makes is bound to favor one faith over another and thus contravene neutrality by its very terms; even an ecumenical statement that seeks to be inclusive of all faiths favors ecumenical religion over the more sectarian kinds. *See Weisman*, 505 U.S. at 590 (government may not "establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds"). Government-sponsored religious speech in public settings also is out of step with individual choice, since "[a]ny religious observance at a public event necessarily requires a collective decision": "[g]overnment must

[4] The program's only limitation on participating schools is that an STO may not provide scholarships to schools that "discriminate on the basis of race, color, handicap, familial status or national origin." Ariz. Rev. Stat. Ann. § 43-1089(G)(2).

decide whether the content of the speech will be religious or secular, in which religious tradition, and how intensely religious, or it must delegate these choices to a selected citizen who becomes a government agent for this purpose." Laycock, *supra*, 118 Harv. L. Rev. at 158.

The precise boundaries of government's ability to speak religiously tend to be uncertain, as the Court struggles with questions such as what constitutes acknowledgment of religion rather than explicit promotion of it. *See, e.g.*, *Van Orden v. Perry*, 545 U.S. 677 (2005). But this case, of course, raises no such issues. The relevant point here is that the Court has reaffirmed significant Establishment Clause limits on government religious speech at the same time as it has rejected limits on even-handed government funding for education and social services provided by religious institutions. "What reconciles the speech and funding cases is the principal of minimizing government influence and maximizing individual choice." Laycock, *supra,* 118 Harv. L. Rev. at 157. Even-handed government funding benefiting multiple private institutions can promote individual choice; government expression of its own favored message, even an ecumenical one, cannot. "The speech and funding cases are thus united by a principled commitment to government neutrality and individual choice in religious matters." *Id.* at 158.

Finally, substantive neutrality and voluntarism also address questions concerning the free exercise of religion: they show when distinctive accommodation of religious exercise is appropriate. Sometimes the

government may or even must treat religion differently from other ideas and activities in order to preserve the goals of substantive neutrality: private religious liberty and minimum government interference in religious choices and commitments. For example, the government may accommodate private, voluntary religious exercise by exempting it from burdensome regulation, even if the exemption does not "come packaged with benefits to secular entities." *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 338 (1987). Even though such an exemption gives religion distinctive treatment, it is constitutionally legitimate if it "does not have the effect of 'inducing' religious belief, but instead merely 'accommodates' or implements an independent religious choice." *Thomas v. Review Bd.*, 450 U.S. 707, 727 (1981) (Rehnquist, J., dissenting).[5]

---

[5] Accommodation of religious choices may frequently be a matter of government discretion rather than constitutional mandate. *See Employment Division v. Smith*, 494 U.S. 872 (1990); *compare Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993). But that constitutional interpretation stems largely from concerns about judicial competence to declare exemptions, not from a rejection of the importance of religious choice. *See id.* at 890 ("to say that a nondiscriminatory religious-practice exemption 'is permitted, or even that it is desirable,' is not to say that . . . the appropriate occasions for its creation can be discerned by the courts"). In any event, there remain questions about the precise scope of *Smith*: to what extent it still requires or leaves room for constitutionally mandated exemptions from facially religion-neutral laws. *See, e.g.*, *Fraternal Order of Police v. City of Newark*, 170 F.3d 359, 365-366 (3d Cir. 1999) (Alito, J.) (interpreting *Smith* and *Lukumi* to require holding that exemption in law for even one comparable secular interest generates constitutional duty to exempt religious practice too).

The principle of substantive neutrality or voluntarism therefore unites and explains decisions of this Court in a variety of areas. It explains when government should treat religion the same as other activities and when it should treat them differently. The principle accounts for why the Court recently has rejected Establishment Clause restrictions in one major area, even-handed government funding of private religious institutions, while maintaining them in another, government's promotion of its own religious speech. The themes of choice, voluntarism, and substantive neutrality should be fundamental to the jurisprudence of the Religion Clauses as a whole.[6]

II. Arizona's Program Promotes True Private Choice And Substantive Neutrality, And The Court Of Appeals' Arguments To The Contrary Are Meritless.

Arizona's program of tax credits for contributions to organizations funding scholarships at private schools unquestionably involves true private choice under the criteria set out in *Zelman* (*see supra* pp. 8-10). The state tax credits are separated from religious schools by "multiple layers of private, individual choice": a private STO must form and must choose to fund religious schools, a taxpayer taking the credit must donate to that STO, and a family must choose to apply for a scholarship for its

[6] The overall value of choice or substantive neutrality may lead to specific, distinct principles for particular categories of Religion Clause cases. But those principles, *amici* believe, should ultimately serve the values of private choice, voluntarism, and religious autonomy.

child at the religious school. Pet. App. 90a, (O'Scannlain, J., dissenting from denial of rehearing en banc).[7] At each step, the program's terms are religion-neutral, with "no evidence that the State deliberately skewed incentives toward religious schools" (536 U.S. at 650): taxpayers can choose any STO, the STOs can support religious or nonreligious schools, and parents can seek scholarships at either category of school.

The court of appeals panel held that the program could be declared invalid on the ground that "[u]nlike parents' choices under the program in *Zelman*, or aid recipients' choices under other programs the Court has upheld, parents' choices are constrained by those of the taxpayers exercising the discretion granted by Section 1089." Pet. App. 28a. Assuming the truth of the plaintiffs' allegation that more than 85 percent of the scholarship money at

---

[7] Although this case clearly passes benefits through individuals, *amici* do not believe that a program must formally do so in order to be a program of private choice. As four justices recognized in *Mitchell v. Helms*, 530 U.S. 793 (2000), aid given directly to religious schools or social services can also follow private choice when its terms are neutral and the amount is "based on enrollment." *Id.* at 830 (opinion of Thomas, J.). The per-capita allocation formula "create[s] no improper incentive" for religious education and ensures that "[i]t is the students and their parents—not the government—who, through their choice of school, determine who receives . . . funds." *Id.* Although this case raises no questions about direct-aid programs, it is important to note that a rigid distinction between indirect and direct aid disserves the value of choice and also creates unnecessary, formalistic questions about whether to classify aid as direct or indirect. We therefore urge the Court to phrase its opinion in such a way that allows that properly constructed direct-aid programs may also qualify as programs of private choice.

this time "is available only for use at religious schools," the panel said, the program "skews aid in favor of religious schools, requiring parents who would prefer a secular private school but who cannot obtain aid from the few available nonsectarian STOs to choose a religious school to obtain the perceived benefits of a private school education." *Id.*[8] Thus, "from the parents' perspective," the program was not neutral toward religion but "created 'financial incentives' . . . that 'ske[wed]' the program toward religious schools'" and denied parents a "'genuinely independent'" choice to use secular schools. Pet. App. 30a-31a, 22a, (brackets supplied) (quoting *Zelman*, 536 U.S. at 653; *Witters*, 474 U.S. at 487-88).

The court of appeals' argument is meritless, for two reasons.

A. Individuals' Decisions to Fund Religious Education through STOs are Genuine Private Choices Just as Much as Are Individuals' Decisions to Attend Religious Schools.

The court of appeals did not and could not claim that the Arizona law skewed taxpayers' decisions toward contributing to religious rather than secular schools. Rather, the panel held that taxpayers' decisions, through STOs, to contribute heavily to religious schools skews parents' decisions toward

---

[8] As petitioners emphasize, these facts are essentially unquestioned, so the court of appeals was not just denying a motion to dismiss but was effectively invalidating the Arizona program.

attending religious rather than secular schools. Pet. App. 30-32a. Although the panel acknowledged that taxpayers' decisions were likewise private choices, it fundamentally analyzed them as part of the program affecting parents' choice. Thus it effectively treated them as state actions, *see* Pet. App. 37a (referring to "delegation" of the state power "of scholarship funding to individual taxpayers").

This approach is untenable. Taxpayers' decisions to contribute to STOs, and STOs' decisions to support religious schools, are also fully private choices for purposes of Establishment Clause analysis. There is no basis for distinguishing taxpayers' voluntary decisions to support religious schools from families' decisions to attend those schools.

First, the court of appeals' distinction is irreconcilable with *Zelman*, where the private choices of families to use religious or secular schools were likewise constrained by the private actions of others who chose to operate or support such schools. The panel was flatly wrong to say that constraints on parents' choices make this case "unlike . . . *Zelman*." Pet. App. 27a. The *Zelman* plaintiffs and Justice Souter's dissent objected that 82 percent of the private schools participating in the Cleveland voucher program were religious, about the same percentage as the panel found objectionable here. 536 U.S. at 703 (Souter, J., dissenting) (46 of 56 private schools in district were religious).[9] The

[9] Just as the 82 percent figure for religious schools in the *Zelman* program was similar to the religious-school percentage among Ohio private schools, so the 85 percent religious-school

Court flatly rejected the relevance of this figure, holding—in line with earlier cases—that "[t]he constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations," any more than it turns on whether "most recipients choose to use the aid at a religious school." 536 U.S. at 658; *accord Mueller*, 463 U.S. at 401. Nor can the constitutionality of Arizona's neutral tax-credit and scholarship program depend on whether most STO contributions go to religious schools.

A major reason the Court has given for rejecting that approach is that it is impossible to administer. "As we said in *Mueller*, '[s]uch an approach would scarcely provide the certainty that this field stands in need of, nor can we perceive principled standards by which such statistical evidence might be evaluated.'" *Zelman*, 536 U.S. at 658 (quoting *Mueller*, 463 U.S. at 401). "To attribute constitutional significance" to the percentage of private-school options that are religious, *Zelman* said, would have "the absurd result" of making "a neutral school-choice program . . . permissible in some parts of Ohio, . . . where a lower percentage of private schools are religious schools, but not in inner-city Cleveland, where Ohio has deemed such programs most sorely needed, but where the

---

share of this program is similar to Arizona's overall percentages. Pet. App. 30a, 64a. Religious schools continue to make up a large part of the private school market in most parts of the country. A major reason is that public schools must be free from religious elements and they therefore absorb much of the distinctive demand for nonreligious education.

preponderance of religious schools happens to be greater." *Id.* at 657. "Likewise, an identical private choice program might be constitutional in some States, such as Maine or Utah, where less than 45% of private schools are religious schools, but not in other States, such as Nebraska or Kansas, where over 90% of private schools are religious schools." *Id.* at 657-58. The tallies would also repeatedly shift based on the "private decisions made in any given year by thousands of individual aid recipients." *Id.* at 656 n.4.

The court of appeals' approach here suffers the same crippling problems of manageability. Indeed, the court below added another problem by basing its determination of invalidity on the fact that more parents have applied for scholarships than are available at secular private schools. Pet. App. 30a-32a. This adds yet another shifting feature to the kaleidoscope: the number of parents who happen, at a given place or time, to want a secular private education.

The court of appeals' ruling violates *Zelman* not just because it is impossible to administer, but more fundamentally because it rejects *Zelman*'s principles concerning private choice. For example, Justice Souter objected to the Cleveland program for precisely the reason the panel gave here: that religious schools allegedly had an advantage because of, among other things, "donations of the faithful." 536 U.S. at 705 n.15. The *Zelman* Court made short work of that assertion, pointing out that nonreligious schools can receive the same assistance if people want to give it to them. 536 U.S. at 656 n.4 (noting

"that nonreligious private schools operating in Cleveland also seek and receive substantial third-party contributions" and that "several *nonreligious* schools have been created" since the voucher program began) (emphasis in original). The same, of course, is true here. Taxpayers who favor secular private schools can form STOs limited to that purpose, contribute to them, and receive tax credits. Absolutely nothing in the program's terms or structure discourages them from doing so.

Ultimately, the complaint that too many contributions under the program have been directed to religious schools is a complaint that voluntary religion is vigorous among Arizona taxpayers. It objects to the fact that schools from religious traditions or perspectives have attracted greater contributions "according to the zeal of [their] adherents and the appeal of [their] dogma" (*Zorach,* 343 U.S. at 313). As we have already noted (*supra* p. 13), our tradition of voluntary initiative in religious matters includes initiatives to form and support religious entities, not just decisions to attend or benefit from them. As Robert Baird observed, the voluntary principle—the elimination of financial favoritism by the state in religious matters—unleashed groups to form institutions and philanthropists to fund them. Baird, *supra* p. 13. In other words, it facilitated the voluntary supply of religious activity as well as the voluntary demand for it. On either side, private choice is private choice. The issue, as *Zelman* put it, is not "whether more private religious schools currently participate in the program," but whether "the program . . .

somehow discourage[s] the participation of private nonreligious schools." 536 U.S. at 656.

Beyond misreading *Zelman* to apply only to parents' choices, the panel offered one further reason for distinguishing taxpayers' and parents' choices:

> Unlike parents, whose choices directly affect their children, taxpayers have no structural incentives under Section 1089 to direct their contributions primarily for secular reasons, such as the academic caliber of the schools to which a STO restricts aid, rather than for sectarian reasons, such as the religious mission of a particular STO. Thus, the taxpayers' position in the structure of Section 1089 provides no "effective means of guaranteeing" that taxpayers will refrain from using the program for sectarian purposes.

Pet. App. 41a (quoting *Larkin v. Grendel's Den*, 459 U.S. 116, 125 (1982)). This argument is both inaccurate and a fundamental distortion of the Religion Clauses.

First, the generalizations about parents' and taxpayers' motivations are inaccurate. Parents often choose to send their children to religious schools so they can receive instruction in a particular faith. Catholic parents, for example, have a prima facie duty under canon law "to send their children to those schools which will provide for their *catholic* education." "1983 Code of Canon Law," c.798

(emphasis added); *accord id.*, c.793, §1 ("Catholic parents have also the duty and the right to choose those means and institutes which, in their local circumstances, can best promote the catholic education of their children."). It is hard to see why this is not a "sectarian" consideration under the panel's definition: it certainly "promotes the religious mission of [the Catholic] school" (Pet. App. 38a), and many parents intend to do just that. Conversely, taxpayers may give money to STOs funding secular education in religious schools because they think those schools provide the best education.

In reality, the panel's distinction collapses. Parents who send their children to religious schools often think that a religious component or setting is an important element of a good education. So do taxpayers who support the schools with contributions. Those considerations could be called both "educational" and "sectarian."

Most importantly, the panel's distinction is irrelevant. There is no constitutional policy that taxpayers should "direct their contributions primarily for secular reasons . . . rather than for sectarian reasons" (Pet. App. 41a). Private choices can be "sectarian"; individuals and private groups who take voluntary steps to "promote [a] religious mission" (Pet. App. 38a) are exercising their religious freedom, whether they are parents, private school employees, or taxpayers. "A law is not unconstitutional simply because it *allows* churches," or private individuals, "to advance religion. . . . For a law to have forbidden 'effects' under *Lemon,* it must be fair to say that the *government itself* has

advanced religion through its own activities and influence." *Amos*, 483 U.S. at 337 (emphases in original). To hold that individuals' voluntary funding choices create constitutional problems when they are made to advance religious goals is to misunderstand the Religion Clauses at the most basic level.[10]

B. Arizona Provides Genuine Secular Options, Which Under *Zelman* Include the Public Schools that the State Already Funds.

The percentage of STO-funded schools that are religious is irrelevant for a second reason: an immense range of secular options are available to parents through Arizona's public schools. The calculation whether a state offers genuine secular alternatives under *Zelman* must include the public schools that the state already funds. It does not matter that public schools fall outside the scope of the particular program at issue. As the Court said in *Zelman*, "The Establishment Clause question is

---

[10] Indeed, to base invalidation of an aid program on the principle that government must ensure private decisions are not made for religious reasons would unquestionably have the effect of "inhibit[ing]" religion, *Lemon*, 403 U.S. at 612, and singling out private religious activity for a disability, *see Lukumi*, 508 U.S. at 533. For the reasons set forth in the petitioners' briefs, this case bears no resemblance to *Larkin v. Grendel's Den,* 459 U.S. 116 (1982). That taxpayers as a whole can exercise a general choice and fund schools that provide secular educational value, but with accompanying religious content, bears no resemblance to the prospect in *Grendel's Den* that a church might use an exceptional power of vetoing liquor licenses (a power shared only by schools) to accomplish goals such as favoring its own members. *See id.* at 125.

whether [the state] is coercing parents into sending their children to religious schools, and that question must be answered by evaluating *all* options [the state] provides [ ] schoolchildren, only one of which is to obtain a program scholarship and then choose a religious school." 536 U.S. at 655-56 (emphasis in original); *accord id.* at 676 (O'Connor, J., concurring) (court must evaluate "all reasonable educational options Ohio provides the Cleveland school system, regardless of whether they are formally made available in the same section of the Ohio Code as the voucher program"). In *Zelman*, the Court included in the "range of educational choices" that school children "remain in public school as before, remain in public school with publicly funded tutoring aid, obtain a scholarship and choose a religious school, obtain a scholarship and choose a nonreligious private school, enroll in a community [i.e. charter] school, or enroll in a magnet school." *Id.* at 655.

Treating public schools as genuine secular options recognizes a point emphasized in our first section: Any analysis of whether an educational aid program promotes choice must take into account that the state already funds public schools, typically to the point of making tuition free or nearly so. *See supra* pp. 14-15. If a court ignores this, it fails to describe accurately the actual choices parents have. Ignoring the fact of public-school funding also produces a perverse result: a court strikes down a program of private-school aid for failing to provide adequate choices, therefore putting parents back in the situation where their choices are even more limited because secular public schools are the only option funded.

By its terms *Zelman* indicates that the ordinary public schools should count as a genuine secular option. 536 U.S. at 655 (noting that one choice for children was to "remain in public school as before"). Indeed, here as in *Zelman*, public schools are more attractive in one important sense: state aid covers their entire tuition, rather than simply a portion as with most private schools. See Pet. App. 53a (district court noting that "[a]n Arizona student may attend any public school in the state without cost. . . . In contrast, the average scholarship paid by STOs in 2003 for students to attend private schools was $1,222, a sum unlikely to cover all of the costs of private school attendance."); *Zelman*, 536 U.S. at 654 (parents choosing private schools "must copay a portion of the school's tuition," while parents choosing public-school options "pay nothing"). And no question has been raised here about the educational adequacy of Arizona's ordinary public schools.

The en banc concurrence in the court of appeals, defending the panel's decision, claims that upholding Arizona's program would require overruling *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), which struck down, among other things, programs of tax credits and tuition reimbursements for parents whose children attended private schools. Pet. App. 74a-75a (Nelson, J., joined by Reinhardt and Fisher, JJ., concurring in the denial of rehearing en banc). *Amici* believe that overruling *Nyquist* would bring helpful clarity to the law, since nearly all of the opinion's reasoning has been undercut by decisions from *Mueller* through *Zelman*. Although

the reimbursements and tax credits in *Nyquist* went to parents only because they had voluntarily chosen a private school, the majority found this unimportant because tuition-tied aid was not restricted to a religious school's secular activities (413 U.S. at 781-83, 791)—an argument that the "private choice" cases from *Mueller* through *Zelman* plainly reject. *Nyquist* objected to private-school aid programs on the ground that "the bulk" of their ultimate beneficiaries were religious schools, *id.* at 780—an argument undercut by the Court's clear, recent refusal to look at the percentage of beneficiaries under a religion-neutral program. Most basically, in measuring whether aid had the effect of advancing religion, *Nyquist* refused to consider the fact that the state already subsidized public schools, 413 U.S. at 782 n.38—while *Zelman* says that the court must "evaluat[e] *all* options [the state] provides [to] schoolchildren." 536 U.S. at 656 (emphasis in original). Until the Court repudiates *Nyquist* altogether, plaintiffs and lower court judges may try to return to its reasoning, as the panel did here, by seizing on minor distinctions.

Although overruling *Nyquist* would have a beneficial effect, we hasten to add that the Court need not overrule it in order to uphold Arizona's program. *Zelman* distinguished *Nyquist* on the ground that Ohio provided Cleveland parents a variety of public-school options alongside private-school vouchers, including community (or charter) schools, magnet schools, and supplemental tutoring in the regular public schools. Thus, the Court said, parents choosing vouchers "receive from the State precisely what parents who choose a community or

magnet school receive—the opportunity to send their children largely at state expense to schools they prefer to their local public school." *Zelman*, 536 U.S. at 660 n.6. Here too, the state provides a variety of public-school choices. As the Arizona Supreme Court noted, the state legislature "has, in recent years, expanded the options available in public education." *Kotterman v. Killian*, 972 P.2d 606, 611 (Ariz. 1999) (noting charter schools and open enrollment); *see also* Pet. App. 99a-100a (O'Scannlain, J., dissenting from denial of rehearing en banc) (noting open enrollment, tax credits for donations to public-school activities, and charter schools).[11]

In the end, *amici* believe, it should not be constitutionally significant whether a state's public schools include charter or magnet schools. Ordinary

---

[11] The panel's opinion is also inconsistent with *Nyquist*—and numerous other decisions of this Court—in holding that an aid program for private education might be said to lack a secular purpose. Pet. App. 19a-20a. Although *Nyquist* found that the various forms of aid had an unconstitutional effect, it quickly dismissed the argument that they lacked a secular purpose. 413 U.S. at 773 (stating that "we do not doubt," "nor do we hesitate to acknowledge," the purposes of promoting educational quality and pluralism). No decision by this Court has ever suggested, as the panel here did, that the prospect that most aid might be used at religious schools makes the legislature's declared purposes a "sham." Rather, "governmental assistance programs have consistently survived this inquiry even when they have run afoul of other aspects of the *Lemon* framework. This reflects, at least in part, our reluctance to attribute unconstitutional motives to the states, particularly when a plausible secular purpose for the state's program may be discerned from the face of the statute." *Mueller v. Allen*, 463 U.S. 388, 394-95 (1983) (citations omitted). This point reinforces how extreme the panel opinion is.

public schools, if adequate, count as a genuine secular alternative under *Zelman*. *See* 536 U.S. at 655. The addition of public-school choices should be a matter of educational policy, not a precondition to the constitutionality of any aid for families who choose to use private schools. It would be clearer for the Court to overrule *Nyquist* rather than to distinguish it on the thin ground that there are charter or magnet options in public schools. But we reiterate that if the Court is reluctant to overrule *Nyquist*, it can distinguish it here on the same ground—the presence of various public-school options—that distinguished *Zelman*.

Finally, the en banc concurrence claimed that if public schools counted for purposes of evaluating secular options, then "a program that provided tax deductions exclusively to parents sending their children to *religious* schools" would be valid as "a 'neutral educational assistance program'" as long as the state had public schools. Pet. App. 75a (Nelson, J., joined by Reinhardt and Fisher, JJ., concurring in the denial of rehearing en banc). This argument is a non sequitur. Regardless of whether secular public alternatives exist, a program encompassing religious but not secular private schools would violate *Zelman*'s separate requirement that the state make aid available "on neutral terms, with no reference to religion." 536 U.S. at 653; *see id.* at 652 (requiring that aid be "neutral with respect to religion" as well as channeled through individual choice). With such discriminatory terms, the state would indeed "deliberately ske[w] incentives toward religious schools." *Id.* at 650.

But formal, purposeful state discrimination against parents' secular-school choices is entirely different from this situation: an even-handed state program where parents' actual choices are affected by the menu of options provided by private initiative. The latter is inevitable when a sector is left to voluntary action—and whenever religion is left, as is proper, "to the zeal of its adherents and the appeal of its dogma" (*Zorach*, 343 U.S. at 313). As Judge O'Scannlain put it: "If the government takes the constitutionally required hands-off approach, external factors will define the playing field." Pet. App. 97a (O'Scannlain, J., dissenting from denial of rehearing en banc). It bears repeating, however, that even with limited private-school options, the public schools remain as a genuine secular option—and that it is perverse to strike down private-choice aid programs, which typically increase parents' choice, on the ground that they do not increase it enough.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

Douglas Laycock
580 Massie Road
Charlottesville, VA
22903
(434) 243-8546

THOMAS C. BERG
Counsel of Record
MSL 400, 1000 LaSalle Ave.
Minneapolis, MN 55403
tcberg@stthomas.edu
(651) 962-4918

Nathan J. Diament
Institute for
Public Affairs
Union of Orthodox
Jewish Congregations
of America
800 8th Street, NW
Washington, D.C.
20001
(202) 513-6484

Kimberlee Wood Colby
Christian Legal Society
8001 Braddock Rd.,
Ste. 300
Springfield, VA 22151
(703) 894-1087

Anthony R. Picarello, Jr.
Jeffrey Hunter Moon
United States Conference
of Catholic Bishops
3211 Fourth St., N.E.
Washington, D.C. 20017
(202) 541-3300

Cathi Herrod
Deborah Sheasby
Center for Arizona Policy
7227 North 16th St.,
Ste. 250
Phoenix, AZ 85020
(602) 424-2525

Shapri D. LoMaglio
Council for Christian
Colleges & Universities
321 Eighth St. NE
Washington, DC 20002
(202) 546-8713